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No. 85-1745

In the Supreme Court of the United States

OCTOBER TERM, 1986

RIXSON MERLE PERRY, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

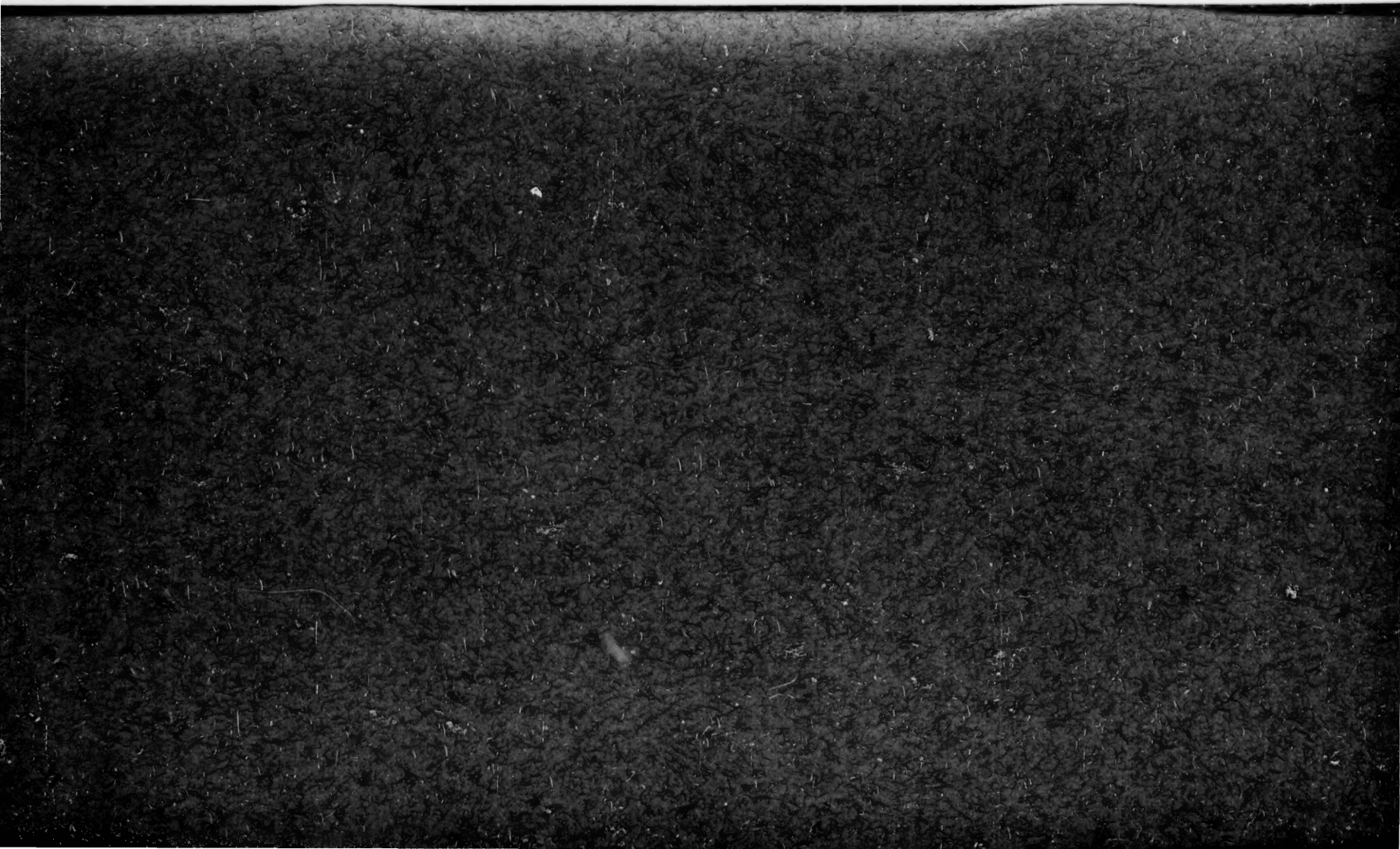
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QUESTIONS PRESENTED

1. Whether a law enforcement agency deprives an individual of a protected liberty interest when it forwards an investigative report containing defamatory allegations by third parties to the individual's prospective government employers.

2. Whether, if we assume that the transmittal of such a report deprives the individual of liberty, that individual nevertheless receives all the process due if he is given an opportunity to respond to the third-party allegations.

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OPINIONS BELOW

The opinion of the court of appeals on rehearing en banc (Pet. App. 1-25) is reported at 781 F.2d 1294. The opinion of the panel of the court of appeals (Pet. App. 26-49) is reported at 759 F.2d 1271. The opinion and order of the district court (Pet. App. 50-63) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 64) was entered on January 23, 1986; the petition for certiorari was filed on April 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, petitioner applied for a law enforcement job with the Bureau of Alcohol, Tobacco and Firearms (BATF). He was given a tentative offer of employment, and authorized BATF to obtain information about his background, including police and criminal records. BATF in turn contacted the Federal Bureau of Investigation (FBI), which forwarded to BATF a five-page investigative report on petitioner. This report described allegations by third parties that petitioner on several occasions had impersonated federal and state law enforcement officers, and that he had received poor evaluations during several brief periods of employment. Pet. App. 3-6, 27. The report stated that these allegations were "neither recommendations nor conclusions of the FBI," [1] and it made no recommendation as to whether petitioner should be hired by BATF (*id.* at 3).[2]

After receiving the FBI report, BATF conducted its own background investigation of petitioner, which unearthed additional unfavorable information that had not been recounted in the FBI memorandum (Pet. App. 6-7). BATF also afforded petitioner an

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[1] The report was not compiled for employment purposes; it was created in the course of an FBI investigation into allegations that petitioner had impersonated a federal officer (Pet. App. 3). The United States Attorney declined to prosecute petitioner on this charge (*ibid.*).

[2] In the FBI file released to petitioner, a cover sheet attached to the investigative memorandum contained a statement by an FBI official that the report " 'clearly reflects [petitioner's] unstable nature' " (Pet. App. 3). The en banc court of appeals concluded, on the basis of evidence in the record, that this cover sheet was not among the materials transmitted to BATF (*id.* at 3-4).

opportunity to contest the allegations in the FBI report. Shortly afterwards, BATF withdrew petitioner's offer of employment (*id.* at 7, 28). Petitioner subsequently applied for law enforcement jobs with three other federal agencies (the United States Marshals Service, the Department of Agriculture and the Internal Revenue Service). Each of these applications was rejected after the agency involved received a copy, or learned about the contents, of the FBI report. *Id.* at 28. Petitioner also wrote to the FBI, asking it to amend his file; while the Bureau refused to expunge the challenged allegations, it included in the file a copy of petitioner's letter contesting the accuracy of the information in the investigative report.

2. Petitioner then brought this suit against the FBI and the federal agencies to which he had applied for employment, claiming in relevant part that the information in the FBI report is false and that its dissemination violated his Fifth Amendment right to due process. The district court dismissed the suit (Pet. App. 50-63), holding that "dissemination of the * * * FBI report * * * did not 'stigmatize' the plaintiff and therefore did not implicate the plaintiff's 'liberty' interest" (*id.* at 58).

A divided panel of the court of appeals reversed (Pet. App. 26-49). The panel acknowledged that, under *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Paul* v. *Davis*, 424 U.S. 693 (1976), petitioner would not have stated a claim had he asserted only that the FBI report defamed him, or only that the report prevented him from getting a particular government job (Pet. App. 33). But the court reasoned that a liberty interest is "implicated when * * * the state imposes on an individual a stigma or other disability foreclosing his freedom to take advantage of

other employment opportunities" (*id.* at 34-35). And here, the court held that the FBI report "contains allegations of behavior that effectively foreclose [petitioner's] chances of being employed in the law enforcement field, or being employed by the federal government in any capacity" (*id.* at 40). The court accordingly held that petitioner had been deprived of liberty; it remanded the case to the district court for a determination of what process was due, leaving it open for that court to find that petitioner already had received the requisite procedural protections (*id.* at 40-42).[3]

3. On rehearing en banc, the full court of appeals reversed the panel's holding that petitioner had asserted a cognizable claim against the FBI. The en banc court noted that there was no need in this case "to discourse on due process generally in all job-related circumstances, only to examine [petitioner's] liberty issue in its own particular preemployment factual setting" (Pet. App. 8). In this context, the court held that there were two insurmountable obstacles to the success of petitioner's claim of a deprivation of liberty. The court first held that the FBI report had not "stigmatize[d] [petitioner]" (*id.* at 11-14). In reaching this conclusion, the court emphasized that "[i]n addition to being clearly designated that it was not to be construed as a recommendation [or] conclusion of the FBI, the information [in the report] was presented in a straightforward manner without

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[3] While allowing the case to proceed against the FBI, the court affirmed the dismissal of the claims against the other defendants. The court reasoned that the agencies to which petitioner had applied for employment "have not done anything to make it impossible, or nearly impossible, for [petitioner] to work in law enforcement." Pet. App. 43.

editorial comment" (*id.* at 12). Because the FBI did not defame petitioner, the court concluded, the Bureau should not be deemed to have deprived him of liberty by foreclosing his prospects for employment.

Equally as important, the court noted that petitioner's claim did not present "the more serious situation of a firing or a failure to rehire a government employee" (Pet. App. 10). In the "preemployment context" presented here (*ibid.*), the court reasoned that "a liberty interest is not implicated merely by a reduction in an individual's attractiveness to potential employers" (*id.* at 15). The court thus held that "[a] mere failure to hire, considering all the circumstances of this case, does not meet the 'stigma plus' standard" (*id.* at 16). Under that due process doctrine, the court explained, "although a stigma to reputation alone does not constitute a deprivation of liberty, 'infliction of a stigma accompanied by a *failure to rehire* (or *a fortiori*, by a *discharge*) states a claim for deprivation of liberty without due process' " (*id.* at 16 n.6 (citation omitted; (emphasis added)). The asserted defamation of petitioner was not associated with the loss of employment, however, which led the court to conclude that a liberty interest had not been implicated by the distribution of the FBI report.

The en banc court also added an alternative holding: it concluded that even if petitioner had been deprived of liberty, the deprivation had been accompanied by due process. The court explained that petitioner's "vague request on appeal and at rehearing for a hearing to 'clear his name' has in essence been satisfied as [petitioner] had numerous opportunities, short of a full hearing, which he took advantage of to protect his interests" (Pet. App. 17). These included petitioner's discussion of the FBI report "in

detail with various federal officials in person, by letter, [and] by phone," as well as the inclusion in his FBI file of a letter challenging the accuracy of the report. In these circumstances, the court concluded that "additional due process requirements would constitute an unnecessary and impractical burden on federal law enforcement practices." *Ibid.*[4]

ARGUMENT

Petitioner takes issue with both of the en banc court's alternative holdings—its ruling that petitioner was not deprived of liberty and its independent conclusion that, even if such a deprivation took place, he was accorded all the process due—asserting that both holdings are inconsistent with the decisions of this Court and of other courts of appeals. These contentions are without merit. Petitioner's criticism of the en banc court's first holding is grounded on a misreading of the court of appeals' opinion; his challenge to the second relies on a misunderstanding of the law.

1. a. In challenging the court of appeals' holding that he was not deprived of liberty, petitioner contends (Pet. 6-11) that the court disregarded the import of the so-called "stigma-plus" doctrine. That

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[4] Judge Posner concurred (Pet. App. 19-21), noting that a traditional defense to the common law tort of defamation "is the qualified privilege for internal communications on official business" (*id.* at 20). Judge Posner found that privilege applicable here, where the claim involved only "internal governmental communications on matters of governmental concern" (*id.* at 21). Chief Judge Cummings and Judge Cudahy, the members of the panel majority, dissented (*id.* at 21-24). They adhered to the views expressed by the panel, taking issue with what they termed the en banc court's conclusion that the FBI report did not stigmatize petitioner and did not foreclose his employment opportunities (see *id.* at 22).

label has been applied to this Court's suggestion that injury to reputation, when combined with loss of government employment or other grievous injury, may result in the deprivation of a liberty interest. The Court has found this doctrine applicable even when the individual who lost his government employment was not tenured, and therefore did not have an independent, constitutionally protected property interest in that employment. See *Owen* v. *City of Independence*, 445 U.S. 622, 633 n.13 (1980). Petitioner insists that the en banc court's holding abandoned this aspect of the stigma-plus doctrine.

In fact, however, the court of appeals explicitly reaffirmed the stigma-plus doctrine (see Pet. App. 16 & n.6), and cited with approval previous decisions of the Seventh Circuit in which the doctrine was applied (*id.* at 11 (citing *Munson* v. *Friske*, 754 F.2d 683 (1985), and *Lawson* v. *Sheriff of Tippecanoe County*, 725 F.2d 1136 (1984)).[5] The court of appeals held only that the doctrine was inapplicable in the "circumstances of this case," where the alleged injury to reputation was associated with a "mere failure to hire" (Pet. App. 16) rather than with "the more serious situation of a firing or failure to rehire a government employee" (*id.* at 10).

The en banc court's holding that the stigma-plus doctrine is inapplicable in this sort of "preemployment context" (Pet. App. 10) is entirely consistent with the decisions both of this Court and of the courts of appeals. This Court has emphasized that the doctrine comes into play only when the defamatory ma-

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[5] In a decision handed down after the ruling in this case, the Seventh Circuit again reaffirmed its adherence to the stigma-plus doctrine. *Ratliff* v. *City of Milwaukee*, No. 85-1946 (July 9, 1986), slip op. 25.

terial is circulated "in connection with [the plaintiff's] termination" (*Codd* v. *Velger*, 429 U.S. 624, 628 (1977)); it is the dismissal or other action *changing* the plaintiff's status that "trigger[s] the due process right to a hearing." *Owen*, 445 U.S. at 633 n.13. See *id.* at 661 (Powell, J., dissenting); *Codd*, 429 U.S. at 629 (Brennan, J., dissenting); *id.* at 633 (Stevens, J., dissenting). Cf. *Bishop* v. *Wood*, 426 U.S. 341, 348 n.12 (1976). Indeed, petitioner's suggestion that the stigma-plus doctrine is applicable in the preemployment setting is squarely foreclosed by *Paul* v. *Davis*, 424 U.S. 693 (1976), where the Court held that defamatory government statements did not give rise to a deprivation of liberty even though those statements "seriously impair[ed] [the plaintiff's] future employment opportunities." *Id.* at 697; see *id.* at 720, 734 (Brennan, J., dissenting); *Codd*, 429 U.S. at 633-634 (Stevens, J., dissenting).[6]

Given this background, it is not surprising that the courts of appeals have applied the stigma-plus doctrine only when the plaintiff was defamed in connection with a termination of government employment. That was the situation involved in each of the cases relied upon petitioner (Pet. 8-9 & n.2).[7] Conversely,

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[6] It has been suggested that the stigma-plus doctrine is in tension with *Paul*, because the doctrine's premise is "that an unprotected interest in an untenured position plus an unprotected interest in reputation equals a protected interest. The logic of this analysis is not crystalline" (*Mosrie* v. *Barry*, 718 F.2d 1151, 1163 n.8 (D.C. Cir. 1983) (Ginsburg, J., concurring)). Because the doctrine is inapplicable here on its own terms, however, this case does not offer the Court an opportunity to consider the consistency of the doctrine with *Paul*'s holding.

[7] Indeed, several of those decisions explicitly noted that such a change in status was crucial to the existence of a cause of

the courts of appeals explicitly have declined to apply the doctrine when the plaintiff did not suffer that sort of concrete change in circumstances. See, *e.g.*, *Robb* v. *City of Philadelphia*, 733 F.2d 286, 294 (3d Cir. 1984) (defamation associated with denial of promotion and denial of transfer insufficient to implicate liberty interest); *Moore* v. *Otero*, 557 F.2d 435, 437-438 (5th Cir. 1977) (defamation associated with demotion insufficient); *Sullivan* v. *Brown*, 544 F.2d 279, 283-284 (6th Cir. 1976) (defamation associated with reassignment insufficient); *Hardiman* v. *Jefferson County Board of Education*, 709 F.2d 635, 638-639 (11th Cir. 1983) (defamation associated with suspension with pay insufficient); *Mosrie* v. *Barry*, 718 F.2d 1151, 1161-1162 (D.C. Cir. 1983) (defamation associated with transfer to less desirable assignment not sufficient).[8] Because petitioner cannot point to a termination of employment or other substantial change in circumstances, his claim would not prevail in any court of appeals. His allegation of a conflict in the circuits accordingly is chimerical.

b. It may be added that the en banc court also held the stigma-plus doctrine to be inapplicable here for an entirely independent reason, which is not even ad-

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action. See, *e.g.*, *Dennis* v. *S & S Consolidated Rural High School District*, 577 F.2d 338, 343 (5th Cir. 1978).

[8] In *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984), the court held that a liberty interest was implicated when, in connection with the imposition of a stigma, the federal government failed to reemploy the plaintiff in a GS-13 position, instead offering him only a temporary GS-12 slot. The court emphasized that a liberty interest may be implicated only where the government's action "effects 'a removal, extinguishment, or significant alteration of an interest recognized and protected by . . . law.'" *Id.* at 1415 (citation omitted).

dressed by petitioner: the court found that the FBI report did not impose a stigma on petitioner. As the court noted, the FBI did not itself characterize petitioner's conduct in any way, and it did not disseminate its report to persons outside of the government. Instead, it forwarded information that had been provided by third parties during the course of an independent criminal investigation to petitioner's prospective government employers. In doing so, the FBI emphasized that the report "contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency." C.A. App. 2.

This Court never has held that the government's neutral transmittal of information provided by third parties—particularly a transmittal only to other government agencies—imposed a stigma within the meaning of the stigma-plus doctrine. Cf. *Codd*, 429 U.S. at 626; *id.* at 638 n.11 (Stevens, J., dissenting). Compare *Owen*, 445 U.S. at 633 n.13. Indeed, none of the decisions cited by petitioner (Pet. 9 n.2) held that the government had stigmatized an individual when it acted only as a conduit for information.[9] And the absence of any such decision is not accidental: it follows from the nature of the interests protected by the stigma-plus doctrine. Where the allegations of improper conduct have been leveled by a third party, have not been disseminated by the government to persons outside the government, and expressly have not

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[9] To the contrary, in *Doe* v. *Department of Justice*, 753 F.2d 1092, 1108 (D.C. Cir. 1985) (emphasis added) (cited by petitioner at Pet. 8), the court of appeals acknowledged that "the government must be the *source* of the defamatory allegations" if a liberty claim is to be stated.

been endorsed by any government agency, the plaintiff's reputation has not been sullied by " 'what the government is doing to him.' " *Owen*, 445 U.S. at 633 n.13, quoting *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). Similarly, the only remedy available to an individual who has suffered a deprivation of liberty under the stigma-plus analysis is " 'an opportunity to clear his name' " (*Codd*, 429 U.S. at 627 (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 573 n.12 (1972)). When the government has not itself characterized the plaintiff, there is no call for a response to defamatory government action.[10]

2. Petitioner also takes issue (Pet. 11-12) with the en banc court's holding that, if a liberty interest was implicated here, he received all the process due. Even if this contention had substance, the validity of the court's alternative holding that petitioner was not deprived of liberty would make its consideration by this Court unnecessary. But petitioner's claim of a conflict in the circuits on this point is, in any event,

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[10] This conclusion draws support from *Davidson* v. *Cannon*, No. 84-6470 (Jan. 21, 1986), and *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986), which held that the Due Process Clause "is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property." *Davidson*, slip op. 3. Here, petitioner has not seriously contended that the FBI acted maliciously; while he states his belief that "the FBI is disseminating an untrue report about him in retaliation for his breach of an employment contract with the FBI and his subsequent criticism of the agency" (Pet. 4), the en banc court determined that petitioner never "attempted to show that the FBI actually fabricated false information and distributed it with some malicious intent" (Pet. App. 15). Yet if petitioner's claim is simply that the FBI denied him due process by failing to exercise due care in passing along a file without checking the accuracy of its contents, the claim cannot survive *Davidson* and *Daniels*.

unfounded, and his fact-bound contention that he did not receive due process is without merit.

Petitioner asserts that when an individual suffers a deprivation of liberty in the stigma-plus context, the government must hold a hearing to give that individual an opportunity to clear his name. In support of this proposition, petitioner cites *Codd* v. *Velger*, *supra*, and several decisions of the courts of appeals. But *Codd* did not purport to establish a firm rule that formal hearings are required to provide adequate process whenever defamation occurs. Instead, *Codd* indicated that the heart of the due process guarantee is the individual's right to receive a meaningful opportunity to respond to the defamatory material: "the remedy mandated by the Due Process Clause of the Fourteenth Amendment is 'an opportunity to refute the charge.'" 429 U.S. at 627 (quoting *Roth*, 408 U.S. at 573). See generally *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 12. Similarly, we are aware of no decisions by the courts of appeals requiring an evidentiary hearing in a situation such as the one here, where an individual seeking government employment wishes to contest charges made by third parties.[11] To the contrary, the panel of the court of appeals that originally found a deprivation of liberty here itself acknowledged (Pet. App. 40-42) that petitioner might already have received due process.

Because "due process is flexible and calls for such procedural protections as the particular situation demands" (*Morrisey* v. *Brewer*, 408 U.S. 471, 481

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[11] In the cases cited by petitioner (Pet. 11-12), courts held that hearings were required to allow plaintiffs to refute governmental accusations made in the course of the termination of employment.

(1972)), it is clear that a formal hearing was not required in the circumstances of this case. Obligating the FBI to hold a hearing whenever it wishes to forward an investigative report to a sister law enforcement agency would be extraordinarily burdensone, and would likely chill the willingness of such agencies to share information (see Pet. App. 18). Applying the balancing test articulated in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), the court of appeals accordingly determined that

> [t]he burden on the government, and particularly the FBI, of holding a full hearing in these circumstances for every unsuccessful job applicant would not only be enormous, but also misguided. On balance, the risk to public safety far outweighs the possibility that some potential law enforcement employer might rely on the leads in the FBI file, without more, in rejecting an otherwise qualified applicant who disputed the validity of the information.

Pet. App. 18.

Against this background, petitioner plainly received ample opportunity to contest the information in the FBI report. The report itself contains petitioner's denial of at least one alleged incident and his explanation of another; the FBI also placed in petitioner's file his letter contesting the accuracy of the remainder of the allegations (Pet. App. 17). In addition, BATF afforded petitioner several opportunities to challenge the material in the report (*id.* at 6-7). This procedural course gave petitioner a full " 'opportunity to refute the charge[s]' " (*Codd*, 429 U.S. at 627 (citation omitted)), and therefore afforded him all the process due.

CONCLUSION

The petition for a writ of certiarari should be denied.

Respectfully submitted.

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